FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

The City of Covington, Kentucky, and John H. MacDonald, Assessor of the City of Covington, Appellants,

vs.

The First National Bank of Covington, Appellee.

The First National Bank of Covington, Kentucky, Appellant,

vs.

The City of Covington, and John H. MacDonald, Assessor of the City of Covington, Kentucky, Appellees.

PETITION FOR RE-HEARING.

F. J. HARLOW,
J. H. HAZELRIG,
WM. JULIAN,
Counsel for the City of Covington.

Supreme Court of the United States

THE CITY OF COVINGTON, KENTUCKY, AND JOHN N. MEDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, *Appellants*,

vs.

THE FIRST NATIONAL BANK OF COVINGTON *Appellee*,

AND

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, *Appellant*,

vs.

THE CITY OF COVINGTON AND JOHN N. MEDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, KENTUCKY, *Appellees*.

Nos. 113-114

PETITION FOR RE-HEARING.

To the Honorable the Supreme Court of the United States;

Your petitioners, the City of Covington and John Middendorf, Assessor, now come and respectfully beg this Honorable Court to grant them a rehearing and modification of the able opinion rendered herein on the 17th day of April, 1905 (and wherein Case No. 113 was affirmed), for the following reasons:

After succinctly, and clearly, reviewing the various decisions relative to taxation of National Banks in Kentucky, and sustaining fully all the contentions of the

City of Covington herein, *with a single exception*, Your Honors, in conclusion, say:

> "Without considering the question of constitutional power to tax non-resident shareholders by means of this retroactive law, it seems to us that in imposing upon the bank liability for the past years, for taxes and penalty, upon stock held *without the state*, and which, before the taking effect of the act under consideration, it was not required to return, there has been imposed upon National Banks, in this retroactive feature of the law, a burden not borne by other moneyed capital of the state. This law makes a bank liable for taxes upon property beyond the jurisdiction of the state, not required to be returned by the bank as agent for the shareholders, by a statute passed in pursuance of the authority delegated in Section 5219 (U. S. Stats.), thus imposing a burden not borne by other moneyed capital within the state.
>
> "We think the Circuit Court was right in that part of the decree which enjoined the collection of taxes against the bank for the years 1893 to 1900 inclusive."

Thus it will be seen the sole ground for affirming the judgment, enjoining the collection of the *entire taxes* due the city from 1893 to 1900 (on the shares of *resident* as well as *non-resident* shareholders) is, that *so much* of the act as made the bank liable for tax and penalty on the shares of non-resident owners imposed on the bank a burden not borne by other moneyed capital within the state. Therefore, only *so much* of the act of March 21, 1900, as makes the bank liable for taxes of shareholders "beyond the jurisdiction of the state" is within the pur-

view of Your Honors cogent argument and reasons for holding the act invalid and enjoining the collection of taxes due the city from 1893 to 1900; and we now beg to suggest that an affirmance and injunction against collection of all taxes prior to 1900 against *all* the shareholders is too broad in its effect, because that part of the act providing for collection of taxes on the shares of resident owners is *wholly free from the only objection urged against the enforcement of the act*, viz., that the bank is made liable for (non-residents' tax and penalty) a burden not borne by other moneyed capital within the state, contrary to Section 5219 (U. S. Statute).

So the only remaining question is, whether a revenue statute which is only invalid in part (as to the tax on a separate well defined character of personal property, belonging to non-residents of the state) should be declared wholly inoperative and unenforceable as to the entire tax, provided for by the act, against the property of resident owners which is wholly free from the only objection urged against the validity of the statute?

We earnestly insist that because the statute is repugnant to Section 5219 *in part*, as to a particular class of property (non-resident shares), it should not be held void *in toto;* because the valid and enforceable provisions are *"separable"* from the invalid part of the act.

The rule is too well settled to justify any discussion, further than a simple statement of same, that:

Although a statute may be invalid or unconstitutional in part, the part that is valid will be sustained by the courts where it can be *separated* from that which is void.

Packet Co. v. *Keokuk*, 95 U. S., 80;
Presser v. *Illinois*, 116 U. S., 252;
Field v. *Clarke*, 143 U. S., 649;
Dundee Co. v. *School Dist.*, 21 Fed., 151.
Appeal of Fox, 12 Pa., 337;
In re Tax Assessment, 4 S. D., 6;
Burkholz v. *State*, 84 Tenn., 71;
Gale v. *Owen Co.*, 83 Ky., 61;
Duke v. *O'Brien*, 100 Ky., 710.

Now, since the act of March 21, 1900, can not be enforced in so far as the shares of non-resident owners is concerned, this should in no wise interfere with the assessment and collection of taxes under the act on the shares owned by residents of the state, just as other delinquent taxes are collected in the state of Kentucky.

If the State Legislature has, by accident, failed to provide an effective statute for taxation of the National Bank shares of non-resident owners this does not discriminate against the bank, or the resident shareholders, who are liable for their taxes, any more than a failure to provide for taxation of any other property of non-resident owners.

The interest of each shareholder is as separate and distinct property of the owner thereof as any other species of personal property subject to taxation. The law imposing the tax is a general statute, applying alike to all personal and real property in the state, and the rate of tax is the same. Then how does the enforcement of the valid portion of this act operate to impose a greater burden either on the National Bank or on the resident shareowners than is imposed in Kentucky on other moneyed capital in the hands of individual citizens?

Under our present Kentucky statute of limitation no assessment of taxes can be enforced for more than five years prior to the assessment. Therefore the retroactive portion of the act of March, 1900, *can not operate as a serious hardship* upon the resident share owners, or the bank. All the state banks, and resident shareholders in nearly all the national banks in Kentucky, have paid local taxes for the years in question. Why should this bank complain of the enforcement of the valid portion of this act? Besides, if permitted to require an exhibit of same, it would appear that the actual number of shares of this bank owned by non-residents of Kentucky is *so small* as to amount to nothing practically. Moreover, the present revenue law of Kentucky requires all the national banks to list and pay the taxes on all shares—those owned by resident as well as non-resident shareholders—and, therefore, if the entire statute is inoperative as to delinquents because of this feature in the law, then Your Honors' opinion, in this case, will be far-reaching in its effect in Kentucky.

(See Act March 21, 1904.)

Since the order in this cause, under the opinion, must be an *affirmance*, which precludes any enforcement of the valid provisions of the act of March 21, 1900, or collection of any taxes due the City of Covington for years prior to 1900, *even as against resident shareholders*, and must also operate to interfere with the collection of all delinquent taxes from national banks under the Kentucky Statutes, we earnestly pray this Honorable Court to grant a rehearing, reversal of the circuit court decree, and modification of the recent opinion herein, with such

directions as may please Your Honors to effectuate the valid provisions of the Act of March 21, 1900.

Respectfully,

IRA JULIAN,

F. J. HANLON,

J. H. HAZELRIG,

Attorneys for the City of Covington.

We certify that the foregoing petition for rehearing, and modification of the opinion herein, is in our opinion well founded, and is not made for the purpose of delay.

IRA JULIAN,

F. J. HANLON,

J. H. HAZELRIG.